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The Law Governing Islamic Partnership in the Malaysian Islamic Banking and Financial Institutions: A Legal Analysis

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Abstract

In Malaysia, the Islamic banking and financial products must comply with shariah (Islamic law) and the Malaysian law. The Partnership Act 1961 (Act 135) ('PA') governs all partnership undertakings. However, there is no statute controlling Islamic Partnership products. Do Islamic Partnership products likewise subject to the PA? There is nothing in the PA to indicate that Islamic Partnership does not fall under it. Nevertheless, the Islamic Financial Institutions Act 2013 (Act 759) ('IFSA') provides that all Islamic banking and financial products including Islamic partnership must comply with shariah. But, how if shariah is in conflict with the PA? Will this not affect the validity of Islamic Partnership products? This paper highlights the governing law issues with regard to Islamic Partnership in Malaysia. The authors used legal research methodology to discuss the issues. The authors also provide some suggestions to warrant the validity of Islamic Partnership, both in the law and shariah perspectives.

Keywords: *Islamic Partnership Products; Legal Issues; Governing Law; Malaysia; Islamic Banking and Finance.*

Introduction

Islamic banking and finance aroused quite an interest in the 1960s and 1970s following the resurgence of Islam in the early twentieth century with the momentum being spearheaded particularly by Egyptian Muslim scholars and thinkers such as Muhammad Abduh, Rashid Rida, Hassan al-Banna and Jamaluddin al-Afghani. Islamic banking and finance eventually gained foothold in Malaysia with the establishment of Bank Islam Malaysia Berhad (BIMB) in 1983. Islamic banking and finance facilities has since expanded to meet and serve the customers' demand for user-friendly banking and finance facilities and products. These Islamic banking and financial products include *Mudarabah* - a general and special investment deposit in the nature of profit sharing between the depositors/customers and the bank. acting as the entrepreneur; *Wadiah* - where the bank simply acts as the safe-keeper of the deposits of the depositors/ customers but it may provide returns to the depositors as a gift (*al-Hibah*); *Murabahah* (partnership and equity financing); *Ijarah* (leasing); *Istisna'*(a sale contract by way of order for certain product), *Qard* (loan contract), *Rahn* (pledge), *Tawarruq/Commodity Murabahah* (purchasing an asset with deferred price), *Wakalah* (agency contract), *Bay' Dayn* (sale of debt with debt), *Bay' Inah* (sale contract followed by repurchase by the seller at a different price), *Musharakah* and *Mudarabah* (partnership) and *Bay' Bithaman al-Ajil* (BBA) (sale by deferred payment). Due to increasing demand for these Islamic banking and finance products, Islamic windows (Islamic banking and financial products) are likewise introduced by the conventional banks (Yakcop, 1996). The Islamic banking and finance operators in Malaysia is called 'Islamic Financial Institutions' ('IFIs').

Objectives

This paper aims to highlight and discuss the issues of the governing law over Islamic partnership products. The discussion is vital as there is no detailed statutory provisions governing the creation and operation of Islamic partnership products issued by IFIs in Malaysia. Even though there is a specific legislation – the Partnership Act 1961 (Act 135)('PA'), governing the creation and operation of partnership transactions in Malaysia, there is as yet any Islamic partnership

Act so far passed by Parliament in Malaysia to govern Islamic partnership products. Due to the absence of a specific Islamic Partnership Act, the question to be posed is this: Do Islamic partnership products are similarly subject to the PA? It should be borne in mind that, all Islamic banking and financial products must comply with *shariah*, pursuant to the Islamic Financial Institutions Act 2013 (Act 759)('IFSA'). What is *shariah* and the PA are in conflict with each other on partnership transactions' matters? Should the PA prevail over *shariah* or vice versa? If the Islamic Partnership Products do comply with the PA, are they enforceable and valid in the court of law in Malaysia? This paper intends to unravel these issues and provide suggestions to overcome the problems.

The Relevant Statues in the Malaysian Islamic Banking and Financial Products

To begin the discussion, it is noteworthy that, according to the Malaysian Federal Constitution ('FC'), 'partnership' is one of the subject matters of the Federal Government to govern. This is pursuant to item 4(e)(i) of the Ninth Schedule of the FC read together with article 74(1) of the FC. There is nothing in the FC that spells out the jurisdiction and power of the States to govern 'partnership', not even the 'Islamic Law Partnership'. Thus, constitutionally, based on the provision of the FC, the governing law of Islamic Partnership is the federal law, not the states' law.

The intensive legal analysis that this paper entails will cover the issue of the governing law of Islamic Partnership. The relevant statutes are as follows:

1. Civil Law Act 1956 (Revised 1972) (Act 67) ('CLA');
2. Islamic Financial Services Act 2013 (Act 759) ('IFSA'); and,
3. Central Bank of Malaysia Act 2009 (Act 701) ('CBMA').

The Civil Law Act 1956 (Revised 1972) (Act 67)('CLA')

It is a trite fact that in order to warrant certain transaction enforceable at law and in equity, the transaction must comply with the law of the land. The enabling legal provision for many transactions in Malaysia is governed by the Civil Law Act 1956 (Act 67)('CLA'). The sources of Malaysian law are actually the law of England, common law and equity. For instance, section 3(1) CLA provides:

> *"Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall-*
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> a. in Peninsular Malaysia or any part thereof, apply **the common law of England and the rules of equity as administered in England on the 7 April 1956;**
>
> b. in Sabah, **apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;**
>
> c. *n Sarawak,* ***apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949****, subject however to subparagraph (3)(ii)"* (emphasis added).

However, the application of English law may not be made applicable if the Malaysian inhabitants do not permit it or it may be used subject to the Malaysian local needs and circumstances. This is provided under the *proviso* of section 5(1) which reads as follows:

> *"Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to* ***such qualifications as local circumstances render necessary****"*(emphasis added).

Among the cases that deal with the above provisions is *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (Supreme Court, Kuala Lumpur), where Hashim Yeop A Sani CJ (Malaya) said at pages 361-362 as follows:

> *"Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law.* ***The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England****"*(emphasis added).

In *Lori (M) Bhd (Interim Receiver) V Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 (Federal Court at Kuala Lumpur), Edgar Joseph FCJ said at page 103:

> *"It is true that s 3 of the Civil Law Act, 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect, that is 7 April 1956,* ***only in so far as the circumstances permit and save where no provision has been made by statute law. We therefore heartily agree with the Court in Chung Khiaw Bank that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country****. But, having said that, we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law"*(emphasis added).

Likewise, in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 5 MLJ 145 (Federal Court at Putrajaya), where Zulkefli FCJ said at page 163:

> "In his second or 'rebuttal judgment', (rebutting Wan Yahya FCJ's dissenting judgment, the first of its kind in this country as far as I know), Edgar Joseph Jr FCJ quoted at length from an article by Sir Jack Jacob QC, the former Senior Master of the Supreme Court in the United Kingdom in his article The Inherent Jurisdiction of the Court [1970] Current Legal Problems 23. Part of them have been reproduced by Clement Skinner JC in Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd. I do not intend to reproduce them again. The effects are aptly summarized by the learned judicial commissioner in the passage I have reproduced earlier.
>
> Sir Jack Jacob was speaking about the common law of England and the*courts in England.* ***Before the common law of England becomes applicable in this country it must pass the test provided by section 3 of the Civil Law Act 1956****"* (emphasis added).

Further the English law shall be the source for commercial laws in Malaysia including partnership unless there is a written law on it passed by the Malaysian Parliament. Section 5(1) of the CLA (Application of English Law in Commercial Matters) provides:

> *"In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships..., the law to be administered* ***shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England****"* (emphasis added).

While section 5(2) of the CLA provides:

> *"In all questions or issues which arise or which have to be* ***decided in the States of Malacca, Penang, Sabah and Sarawak*** *with respect to the law concerning any of the matters referred to in subsection* ***(1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if***

such question or issue had arisen or had to be decided in England" (emphasis added).

Nevertheless, the obligation to follow English law in matters pertaining to commercial matters including partnership ceases if there is a special written law governing these matters passed by the Malaysian Parliament. This is provided under the provision of section 5(1) and (2) CLA which reads as follows:

"unless in any case other provision is or shall be made by any written law"

It can be said that the law governing Islamic Partnership - *Mudarabah* and *Musharakah* being IFIs' products is the CLA. If it is true then, the law governing *Mudarabah* and *Musharakah* shall be the law of England. However, if there is a written law governing *Mudarabah* and *Musharakah* in Malaysia, then the provisions imposing an obligation to comply with English law is not applicable.

The question is whether there is a written law dealing specifically with *Mudarabah* and *Musharakah* in Malaysia? Insofar as the knowledge of the authors is concerned, there is none. What is available is the conventional (non-Islamic) written law governing partnership undertakings i.e the PA.

A further question can be raised: whether *Mudarabah* and *Musharakah* should comply with the provisions under the PA? And fall under its purview? There is hitherto no case law that deal with this issue either.

Further, so far there is no case law which decides that *Mudarabah* and *Musharakah* should fall or should not have fallen under the PA and/or the CLA.

In the opinion of the authors, the issue of the governing law for *Mudarabah* and *Musharakah* is crucial. This is because, without any written law governing them, the law of England *viz*, the common law, equity and statutes of general application as prescribed under section 3 and 5 of the CLA may also automatically, as a matter of course, become the governing law for *Mudarabah* and *Musharakah*. However, this matter has not been dealt with and determined so far by courts in Malaysia.

The Islamic Financial Services Act 2013 (Act 759) ('IFSA') and the Central Bank of Malaysia Act 2009 (Act 701)('CBMA')

Islamic banking businesses are governed by the Islamic Financial Services Act 2013 (Act 759) ('IFSA'). Pursuant to section 2 of the IFSA, 'Islamic banking business' means the business of -

"a. accepting Islamic deposits on current account, deposit account, savings account or other similar accounts, with or without the business of paying or collecting cheques drawn by or paid in by customers; or

b. accepting money under an investment account; and

c. provision of finance; and

d. such other business as prescribed under section 3"

However, in the Central Bank of Malaysia Act 2009(Act 701) ('CBMA'), it does not use 'Islamic banking business', Instead it uses the word 'Islamic financial institutions'. According to the CBMA the word 'Islamic financial institutions' means a financial institution carrying on Islamic financial business (section 2 of the CBMA). While the word 'Islamic financial business' means any financial business in ringgit or other currency which is subject to the laws enforced by the Central Bank (Bank Negara Malaysia ('BNM')) and consistent with *Shariah* (section 2 of the CBMA).

Pursuant to section 3 of IFSA (Prescription by Minister of additional business or activity), The Minister may, on the recommendation of the Bank, prescribe-

a. any business or activity as an addition to the definition of—

i."Islamic banking business";

ii. "international Islamic banking business";

iii. "Islamic financial intermediation activities";

iv. "Islamic factoring business"; or

v. "Islamic leasing business",

and upon such prescription, the definition as added to shall be deemed to be an integral part of this Act as from the date of such prescription, or from such later date as may be specified in the order; and

b. any business, service or activity in relation to a financial service as an Islamic financial advisory business for the purposes of the definition of "Islamic financial advisory business" under subsection 2(1)"

The word 'Minister' in the above provision means the Minister for the time being charged with the responsibility of finance (section 2 of the IFSA). Thus, the Minister of Finance is the Minister meant by section 2.

The obligation to comply with *Shariah* in all the activities of the institutions carrying out Islamic banking business is clearly spelt out in section 28. Section 28(1) of the IFSA (Duty of Institution to Ensure Compliance with *Shariah*) provides as follows:

> *"An institution shall at all times ensure that its aims and operations, business, affairs and activities are in compliance with Shariah"*

Similarly this obligation is spelt out in section 28(2) of the IFSA, which reads:

> *"For the purposes of this Act, a compliance with any ruling of the Shariah Advisory Council in respect of any particular aim and operation, business, affair or activity shall be deemed to be a compliance with Shariah in respect of that aims and operations, business. affair or activity"*

The word 'institution' in the above provision means an authorized person or operator or a designated payment system (section 27 of the IFSA). While the words 'authorized person' means a person licensed under section 10 or approved under section 11 to carry on an authorized business (section 2 of the IFSA). The word 'operator' and 'designated payment system' are respectively defined as 'any person, acting alone or under an arrangement with another person, responsible for the rules, procedures and operations of a payment system' and 'a payment system prescribed as a designated payment system' under subsection 39(1) (section 2 of the IFSA). Sections 10 and 11 meanwhile deal specifically on the grant of licence by the Minister and Approval by the Central Bank (BNM).

An institution carrying out Islamic banking business is under a responsibility to do certain acts once it found that the business that it carries out has contravened *Shariah*. The responsibility to act is prescribed by section 28(3) IFSA. Section 28(3) reads:

> *"Where an institution becomes aware that it is carrying on any of its business, affair or activity in a manner which is not in compliance with Shariah or the advice of its Shariah committee or the advice or ruling of the Shariah Advisory Council, the institution shall-*

a. immediately notify the Bank and its Shariah committee of the fact;

b. immediately cease from carrying on such business, affair or activity and from taking on any other similar business, affair or activity; and

c. *within thirty days of becoming aware of such non-compliance or such further period as may be specified by the Bank,* ***submit to the Bank a plan on the rectification of the non-compliance***" (emphasis added).

As a sanction to the obligation to carry out the above prescribed duties, section 28(4) provides this:

"Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, ***be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both***" (emphasis added).

The *Shariah* Advisory Council (SAC) is a council established by BNM pursuant to section 51 of CBMA. Section 51(1) of the CBMA (Establishment of SAC) provides:

"The Bank may establish a Shariah Advisory Council on Finance which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business"

The word 'Bank' here refers to the Central Bank of Malaysia or in Bahasa Malaysia is called Bank Negara Malaysia ('BNM') (section 2 of the CBMA).

The SAC shall be the authority for the ascertainment of Islamic Law for the purpose of Islamic financial business (section 51 of the CBMA).

It is a duty of the BNM and IFIs to consult the SAC pursuant to sections 55(1) and 55(2) of the CBMA in respect of Islamic financial business and conducting its affairs. Section 55(1) of the CBMA states:

"The Bank shall consult the Shariah Advisory Council on any matter-

a. relating to Islamic financial business; and

b. for the purpose of carrying out its functions or conducting its business or affairs under this Act or any other written law in accordance with the Shariah, which requires the ascertainment of Islamic law by the Shariah Advisory Council"

The purpose of consulting, referring and seeking advice from the SAC is to make sure that the Islamic banking and financial business and its affairs are conducted in accordance with the requirements of *Shariah* (section 55(2) of the CBMA). Section 55(2) of the CBMA provides:

"Any Islamic financial institution in respect of its Islamic financial business, may-

a. refer for a ruling; or

b. seek the advice,

of the Shariah Advisory Council on the operations of its business in order to ascertain that it does not involve any element which is inconsistent with the Shariah"

Apart for sections 51 and 55, sections 56(1), 57 and 58 of the CBMA also prescribe that the rulings and advice of the SAC shall bind the IFIs, the BNM, the *Shariah* Committee of the respective IFIs, the court of law and the arbitrators on matters pertaining to Islamic financial matters.

Section 56(1) (Reference to SAC for ruling from court or arbitrator) of the CBMA provides:

> *"Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be,* ***shall-***
>
> a. take into consideration any published rulings of the Shariah Advisory Council; or
>
> *b. refer such question to the Shariah Advisory Council for its ruling"*(emphasis added).

Section 57 of the CBMA (Effect of *Shariah* rulings) states as follows:

> *"Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part* ***shall be binding*** *on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56"*(emphasis added).

While section 58 of the CBMA (SAC ruling prevails) provides:

> *"Where the ruling given by a Shariah body or committee constituted in Malaysia by an Islamic financial institution is different from the ruling given by the Shariah Advisory Council,* ***the ruling of the Shariah Advisory Council shall prevail****"*(emphasis added).

Thus, the rulings and advice of the SAC shall bind the IFIs, the court of law, the arbitrator and the *Shariah* committee. In other words, the new provisions inserted in the CBMA in relation to the SAC, serve as ouster clauses to oust any jurisdiction and power of the court of law, any other *Shariah* committee of the respective IFIs and any other persons to challenge the rulings and advice of the SAC in respect of Islamic banking/financial business and affairs (Md. Dahlan & Aljunid, 2010; Md Dahlan & Aljunid, 2011).

Apart from complying with *Shariah* and the SAC, the institution carrying out Islamic banking and financial business must follow the standards set out by the BNM and the SAC. This is mentioned in section 29. Failure to carry out this obligation will trigger certain punishment pursuant to section 29(6), which provides:

> *"Any person who fails to comply with any standards specified under subsection (1), commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both"*

Similarly, all persons, including the IFIs, are duty bound to comply with the directions (written circulars, guidelines and notices) of the BNM on any *Shariah* matter relating to the Islamic banking and financial business. These directions are made in accordance with the advice of the SAC. Any person who fails to comply with any of these directions, commit an offence and shall, on conviction, be liable to a fine not exceeding three million ringgit (MYR 3 million) (USD 915,471.48) (section 59(1)(2)(3) of the CBMA).

In addition to the above, the IFIs must also establish their own *Shariah* Committee. The internal *Shariah* Committee duty is to advise the IFIs' business, affairs and activities in order to ensure that they comply with *Shariah.* This is spelt out under section 30(1) of the IFSA. The duties and functions that the *Shariah* Committee carries out must also be consistent with the standards prescribed by the BNM (section 32 of the IFSA).

The superiority and hegemony of the SAC over the court, the IFIs, the arbitrator and the *Shariah* Committee in relation to the Islamic financial business and affairs has been given judicial support and recognition by recent cases namely:

1. *Bank Islam Malaysia Bhd lwn Rhea Zadani Corp Sdn Bhd dan lain-lain* [2012] 10 MLJ 484 (High Court at Kuala Lumpur).

2. *Bank Muamalat Malaysia Bhd lwn Kong Sun Enterprise Sdn Bhd dan lain-lain* [2012] 10 MLJ 665 (High Court at Johor Bahru).
3. *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2012] 3 MLJ 869 (High Court at Kuala Lumpur).
4. *Kuwait Finance House (M) Bhd lwn Teknogaya Diversified Sdn Bhd dan lain-lain* [2012] 9 MLJ 433 (High Court at Kuala Lumpur).
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8. *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2013] 3 MLJ 269 (Court of Appeal at Putrajaya)
9. *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2009] 6 MLJ 416 (High Court at Kuala Lumpur).

From the above provisions, the law governing *Mudarabah* and *Musharakah* shall be *Shariah* and the standards set by BNM and put it bluntly, the SAC. It follows that *Mudarabah* and *Musharakah* being two forms of Islamic partnership may not be subject to the requirements imposed by the PA and the CLA.

In addition, *Shariah* can also be considered as a 'custom or usage having the force of law' and thus automatically can become an applicable law in Malaysia, including on the Islamic financial business and affairs, on the premise of article 160(2) of the FC, read together with section 2 of the Interpretation Acts 1948 and 1967 (Act 388), which defines law to include:

> *"...written law, the common law in so far as it is in operation in the Federation or any part thereof, and* ***any custom or usage having the force of law in the Federation or any part thereof****"*(emphasis added).

If the above contention is true i.e. *Mudarabah* and *Musharakah* may not be subject to the PA and the CLA, then there is still a dubious position regarding the enforceability of the PA and the CLA over *Mudarabah* and *Musharakah* products. The followings are the arguments of the authors:

1. There is no unequivocal provision under the PA which exempts *Mudarabah* and *Musharakah* from its operation.
2. As required by the CLA, there is no special written law governing *Mudarabah* and *Musharakah* in order to exempt them from being subject to the English law, English equity or the PA.

Can we say *Shariah* is the written law governing *Mudarabah* and *Musharakah* products? In the opinion of the authors, so far, there is no Islamic written law passed by Parliament dealing with *Mudarabah* and *Musharakah*. There is only a general provision under the IFSA and CBMA spelling out that Islamic banking and financial products, including *Mudarabah* and *Musharakah*, must comply with *Shariah*. Thus, it is opined, there is a *lacuna* of Islamic written law on *Mudarabah* and *Musharakah* (Islamic Partnership). It follows that if this is true, then the governing law for *Mudarabah* and *Musharakah* is the PA. There is nothing in the PA that exempts *Mudarabah* and *Musharakah* from its operation. It follows that all *Mudarabah* and *Musharakah* products must comply the PA, before it could be considered valid partnership and enforceable in the court of law and equity in Malaysia.

Further argument can be raised in that, if the PA is the governing law for *Mudarabah* and *Musharakah*, what will the situation be, if the provisions under the PA are in conflict with *Shariah*, the SAC, the BNM and the *Shariah* Committee?

There is no answer to the above question, as the provisions in the IFSA are silent. In the opinion of the authors, in this situation, the provisions in the PA shall prevail over *Shariah*, the SAC, the Bank Negara and the *Shariah* Committee.

It is submitted that, the provision spelt out in section 2 of the Interpretation Act 1948 and 1967 (Act 388) read together with article 160(2) of the FC connoting and denoting that *Shariah* is also an applicable law in Malaysia is inadequate and untenable to support the contention that *Shariah* shall be the governing law for *Mudarabah* and *Musharakah*. This is because these two provisions are general provisions defining the meaning of 'law' in Malaysia. Further, these provisions do not provide the written law governing *Mudarabah* and *Musharakah* as required by the CLA. Thus, in the opinion of the authors, in relation to the applicability of *Shariah* over Islamic banking and financial business and affairs, as the provisions under the CLA are the specific, while the provisions under the FC, the Interpretation Act 1948 and 1967 (Act 388), the CBMA and the IFSA are general provisions emphasizing the applicability of *Shariah* as the source of law and definition of law, the provisions under the CLA should prevail.

Thus, in the submission of the authors, there should a written Islamic Partnership Law passed by Parliament to govern *Mudarabah* and *Musharakah*. As there is no Islamic Partnership statute (written law) passed by Parliament, automatically, the PA shall be the governing law for *Mudarabah* and *Musharakah*. To the extreme, it may open contentious floodgates of argument allowing the application of English law, English equity and English statutes of general applications, as the case may be, over *Mudarabah* and *Musharakah* if there is a *lacuna* in provisions under the PA, dealing with any issues concerning *Mudarabah* and *Musharakah*.

The authors re-emphasize here that in order to cause the *Mudarabah* and *Musharakah* products not to be subjected to the PA and the English common law and equity, the authors are of the view that there should be a provision under the PA which exempts its enforceability over *Mudarabah* and *Musharakah* and that a special Islamic Partnership Act (written law) should be passed by Parliament prescribing and enumerating clearly the detailed written law governing *Mudarabah* and *Musharakah* as well. By having these legal and legislative measures the issue of absence of un-equivocality of written law governing *Mudarabah* and *Musharakah* may not arise. In the opinion of the authors, the Islamic banking and financial authority should not totally rely on the blanket provisions under IFSA to justify that *Mudarabah* and *Musharakah*. must comply with *Shariah*, the SAC and the *Shariah* Committee. This blanket provision, it is submitted, is too loose and is not unequivocal, which may lead to disputes and court's litigations.

Nonetheless, todate, there is as yet any case law that deals with the above issues. It is the hope of the authors that preventive and suitable measures would be taken by the government by considering the above arguments and suggestions in order to ensure enforceability and validity of *Mudarabah* and *Musharakah* products in Malaysia.

Conclusion and Recommendations

It is noteworthy that there is no Islamic Partnership Act (written law) governing Islamic Partnership – *Mudarabah* and *Musharakah* has as yet in Malaysia. Due to this, the governing law for Islamic Partnership shall be the Federal Law – the CLA and the PA. Due to this also, English common law, equity and statute of general application may be made applicable to Islamic Partnership too. The provisions under the IFSA and CBMA conferring on the authority of the SAC and SAB to refer to Islamic Law (*Shariah*) can be marginalized and of no meaning due to

its lack of authority and *ultra vires* the FC. Thus, it is timely for the Malaysian Government to provide and pass a detailed and special Islamic Partnership written law to fill in the gap left by the IFSA and CBMA to avoid disputes and problems detrimental to the legal and regulatory framework of Islamic partnership products.

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